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VIA ELECTRONIC FILING

The Honorable Jocelyn Boyd
Chief Clerk/Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: Rulemaking for the Public Service Commission to Create a New Regulation 103-811.5 Role of the Qualified, Independent Third-Party Consultant and Expert and the Commissioners' Reliance on the Contents of the Qualified, Independent Third-Party Consultant and Expert's Report Docket No. 2019-362-A

Dear Ms. Boyd:

Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively, the "Companies" or "Duke"), pursuant to Rule 103-818 of the Rules and Regulations of the Public Service Commission of South Carolina (the "Commission") jointly submit these comments in the above-referenced rulemaking proceeding concerning proposed regulation 103-811.5. The Companies appreciate the opportunity to provide additional comments in response to issues raised at the virtual public hearing held on November 4, 2020.

As discussed at the virtual public hearing and as outlined in the Companies' comments filed in this docket on October 2, 2020, the Companies submit that the proposed regulation, as currently drafted, is inconsistent with due process principles and Act 62, and it violates the prohibition on ex parte communications in S.C. Code Ann. § 58-3-260.

Act 62 makes clear that the independent third-party consultant or expert's conclusions and report will be made part of the evidence of record and used by the Commission, along with all other evidence submitted during the proceeding, to inform its ultimate decision in setting avoided costs for the utilities. See S.C. Code Ann. § 58-41-20(I). For this reason, the parties must be afforded a meaningful opportunity to respond, conduct discovery on the report, and challenge the report on cross-examination. The Companies are, however, cognizant of the Commission's concerns about how the process would work. For the Commission's consideration, the Companies offer the following proposed procedural schedule:



- DEC/DEP file direct testimony;
- The Office of Regulatory Staff (“ORS”) and other intervenors file direct testimony;
- DEC/DEP file rebuttal testimony;
- ORS and other intervenors file surrebuttal testimony;
- Consultant/Expert issues draft report
- Parties conduct limited discovery, approved by the Commission or a hearing officer, on the draft report;
- Consultant/Expert files draft report with the Commission and conducts a limited ex parte briefing to explain the report and answer the Commission’s questions at least 40 days prior to the evidentiary hearing;
- DEC/DEP, ORS, and intervenors file limited testimony in response to the report in advance of evidentiary hearing;
- Consultant/Expert issues final report;
- Evidentiary hearing;
- Parties submit proposed orders;
- Commission issues a decision.

The Companies believe that a procedural schedule along these lines will permit all parties a meaningful opportunity to review and vet the expert’s report without unnecessarily prolonging the proceedings. Moreover, the Companies would submit that allowing the parties to conduct limited discovery, subject to approval by the Commission or a hearing officer, on the expert’s report may actually streamline the proceedings and potentially eliminate the need for late-filed exhibits because the parties will be on notice of any potential issues prior to the evidentiary hearing.

The Companies would also take this opportunity to respond to comments made at the hearing and subsequently filed in this docket by Johnson Development Associates, Inc. (“JDA”) on November 4, 2020. The Companies respectfully disagree with JDA’s position that Act 62 creates a relationship between the Commission and the consultant or expert that is akin to the Commission and its staff. The statute authorizing the hiring of the independent third-party consultant specifically states that “[t]he qualified independent third party is subject to the same ex parte prohibitions contained in Chapter 3, Title 58 as all other parties.” S.C. Code Ann. § 58-41-20(I). This prohibition on ex parte communications is contained in S.C. Code § 58-3-260(B), which provides as follows:

Except as otherwise provided herein or unless required for the disposition of ex parte matters specifically authorized by law, a commissioner, hearing officer, or commission employee shall not communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any person without notice and opportunity for



all parties to participate in the communication, nor shall any person communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any commissioner, hearing officer, or commission employee without notice and opportunity for all parties to participate in the communication.

S.C. Code Ann. § 58-3-260(B). As Dominion noted in its comments at the virtual public hearing, there is no question that the “qualified independent third party” is subject to the same prohibition on ex parte communications as are all other parties to proceedings before the Commission.

However, even assuming the General Assembly intended the expert or consultant to act as an employee of the Commission—a position that the Companies do not believe is supported by the text of Act 62—S.C. Code Ann. § 58-3-260(C) would prohibit the expert or consultant from “furnish[ing], augment[ing], diminish[ing], or modify[ing] the evidence in the record” in ex parte communications with the Commission. Private conversations between the consultant or expert and the Commission concerning the report would certainly modify the evidence in the record, and those conversations or communications would not be available to all parties.

For those reasons, the Companies respectfully request that the Commission adopt the amendments to the proposed regulation, as set forth in the redline attached to the Companies’ October 2, 2020 comments and consistent with the changes described herein.

Yours truly,

Frank R. Ellerbe, III

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cc: Parties of Record (via email)
Heather S. Smith, Deputy General Counsel (via email)
Katie M. Brown, Counsel (via email)